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Supreme Court, U.S.
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No. .

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

ANTONIO MEDINA PUERTA,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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51 pp

QUESTIONS PRESENTED

(1) Is the knowledge of the Bank of Boston, through formal notice from the issuing bank, as to the true value of a check considered the knowledge of its agents for purposes of the federal bank fraud statute?

(2) Must a specific instruction to the jury on unanimity be given, in addition to a general unanimity instruction, when more than one crime is charged in a single count, and the jury is instructed that the defendant may be found guilty if the government proves beyond a reasonable doubt crime "A" *or* crime "B"?

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The Petitioner, Antonio Medina Puerta, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, the review of which is sought by this Petition, was entered on October 21, 1994. It is reported in *United States* v. *Medina*

Puerta, 38 F.3rd 34 (1994), and is reprinted in the Appendix attached hereto, A. 1.

An Order of the Court by the First Circuit denying a Petition for Rehearing and Suggestion for Holding a Rehearing En Banc was entered December 7, 1994. This Order is reprinted in the Appendix attached hereto A. 21.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered October 21, 1994. The First Circuit denied a timely petition for rehearing and rehearing en banc December 7, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1344 provided, at the time of the offense:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice
> (1) to defraud a federally chartered or insured financial institution, or
> (2) to obtain any of the monies, funds, credits, assets, securities or other property owned by or under the custody and control of a federally chartered or insured financial institution by means of false and fraudulent pretenses, representations or promises . . . [shall be punished as provided].

18 U.S.C. § 2314 provides:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted for taken by fraud . . . [shall be punished as provided].[1]

STATEMENT OF THE CASE

I. *Summary of Prior Proceedings*

The Petitioner, Antonio Medina Puerta (hereinafter "Medina" or "the Petitioner"), was indicted by the United States on September 5, 1991 for an alleged offense committed in November, 1986. The Indictment charged violation of 18 U.S.C. § 1344, bank fraud, in Count One, and violation of 18 U.S.C. § 2314, foreign transportation of stolen money, in Count Two.

A trial by jury was held in January, 1993, resulting in verdicts of guilty on both Counts.

On September 30, 1993, Medina was sentenced to eighteen (18) months imprisonment on each of Counts 1 and 2, to be served concurrently, and a restitutional obligation or conditional fine of $150,000.00.

On October 21, 1994, the First Circuit Court of Appeals affirmed the judgment of conviction and on December 7, 1994 that court denied a timely petition for rehearing and rehearing *en banc*.

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[1] The Indictment charged this statutory provision, the government alleging in Count II that the defendant "transmitted and transferred in commerce money in the amount of $350,000.00, more or less, knowing the same to have been stolen, converted and taken by fraud. . . ."

II. *First Circuit's Statement of the Evidence*

The following statement of the evidence, stated in the light most favorable to the government, is taken directly from the First Circuit opinion below, appended hereto:[2]

"In 1986 Medina was a research associate at a non-profit research organization in Boston then known as the Eye Research Institute. Medina had been born and raised in Spain and was fluent in both English and Spanish. He had Spanish graduate degrees in optics and engineering and a graduate degree in electrical engineering from Massachusetts Institute of Technology.

On November 3, 1986, Medina deposited a check in his account in that branch of the Bank of Boston where he did most of his banking. The check was a bank check prepared by Banco Central of Spain, dated October 30, 1986, at Toledo, Spain, and was made payable to Medina. The written designation of the amount was, in Spanish, "Dolares USA, Trescientos Sesenta Y Cinco," which translates as "three hundred and sixty-five U.S. dollars." There was also an Arabic numeral expression of the amount in a small box on the right-hand side of the check: "USD 365,000." The words "First National Bank of Boston" appear on the check, and both the government and Medina have described it as a check drawn on Banco Central's own checking account at the Bank of Boston.

When Medina deposited the check in his account on November 3, 1986, he listed the amount on the deposit slip as "$365,000." Two days later, on November 5, Medina returned to the branch and requested a customer service representative, Lisa Popielski, to wire $350,000 from Medina's check-

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[2] For the convenience of the Court, quotation marks are placed only at the beginning and very end of this quoted statement of the evidence.

Footnotes 3, 4, and 5 are Petitioner's explanations and are not part of the First Circuit Opinion.

ing account to an account in England. Apart from the November 3 deposit, Medina's balance was about $3,000. Popielski said that she needed to verify that the check had been collected and asked Medina to return the next day. When Medina returned on November 6, Popielski told him that the $365,000 credit had been deleted from his account and the check had been returned to him by mail. She told him to bring the check back to her if he intenderd to redeposit it.

The following day, November 7, Medina returned with the check and Popielski told Medina that the check had been returned for lack of his endorsement; he then signed the back of the check, Popielski filled out a second deposit slip for him in the amount of $365,000, and Medina redeposited the check into his account. On November 12, Medina returned to the bank and signed a wire transfer order, directing the transfer of $350,000 to an account in his name at Lloyd's Bank in Cambridge, England. Later that morning the funds were wired to England.

When interviewed by the FBI in early December 1986, Medina admitted that he had deposited the check but explained that he thought that the check was funding from a Spanish ministry for a research grant for his work at the Eye Research Institute. He said that he had purchased about $150,000 worth of equipment in Spain where it remained and where some of the research was to be conducted. Medina subsequently gave to the FBI a letter from a Spanish ministry stating that a committee had agreed to propose the funding of a grant.

Medina also submitted to the FBI a summary document prepared within the National Institute of Health which recommended NIH approval of a research application by Medina with proposed funding of $282,286. There was evidence at trial that this application had never been finally approved[3] and

[3] The evidence was that the NIH approved the grant prior to November 1986, but then declined to fund it *well after* the November 1986 events charged in this case.

that, if it had been funded, the Eye Research Institute and not Medina would have received the funds. There was also some evidence, apparently disputed, that Medina had in fact purchased $138,755 in specialized equipment in Spain.

At trial it developed that the bank had stumbled repeatedly.[4] The processing section of the bank had queried Banco Central about the check, and on November 6, the day *before*[5] Medina had redeposited the check, Banco Central had wired that the proper amount of the check was $365. When Medina deposited the check on November 7, only $365 was debited against Banco Central's account, but Medina was credited with a $365,000 deposit. An interoffice adjustment slip was prepared to reduce Medina's deposit by $364,635, but Medina's account records were not corrected until on or about November 25 when most of the money had long since been transferred to England.

Although Medina did not testify, his position at trial was that this was an innocent misunderstanding. Medina did present an expert witness who was familiar with Spain and Spanish accounting who gave testimony on the differences between American and Spanish practices in the writing and punctuation of Arabic numbers on large checks. The government's position was that Medina had certainly read the written Spanish words on the check, which indisputedly represented its amount as $365, and had known that he was not entitled to $365,000."

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[4] In addition to the error of the Spanish bank, there were at least fourteen critical and inexcusable errors by the Bank of Boston in this matter that were causes or significant contributing causes to the problem. These are listed in the Appendix to this Petition, in order to set in context the otherwise unlikely event of the notification to the Bank of Boston of the true value of the check and its subsequent transferring overseas of $350,000 nonetheless.

[5] Emphasis *in original* First Circuit Opinion.

III. *First Circuit Rulings on the Issue of Impossibility.*

One of the Petitioner's arguments on appeal to the First Circuit, and the issue that forms the basis of the First Question Presented in this Petition, is that the Bank of Boston had been informed of and knew the true value of the check, and thus it was impossible for it to be "defrauded."[6] Following are the First Circuit's statements and rulings on this issue:

> It is not clear whether Bank of Boston might have had a claim against Banco Central or its account for the latter's mistake in depicting Arabic numerals; *Banco Central, after all, had warned Bank of Boston about the mistake before the redeposit.*
>
> A. 14
> (emphasis added)

> True, the bank *could have nullified the deposit before the transfer*, had it been more alert.
>
> A. 18
> (emphasis added)

> Medina's final set of arguments is directed to both of the counts against him. He starts with a straightforward argument that the Bank of Boston could not have been defrauded of its money, nor could the money have been taken by fraud, since *Banco Central informed Bank of Boston prior to the second deposit on November 7 that the amount of the check was $365*. . . .

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[6] Another way of phrasing the argument is that proof of the substantive elements of the offense were not and could not have been proven, as the bank knew the true facts and was not "defrauded."

> The government may overstate the matter in arguing that "[i]n contrast the crime of bank fraud focuses on Medina and his state of mind, and not on the conduct of the bank."
>
> A. 18 (emphasis added)

> It might be difficult to defraud an individual, or obtain property by fraud, if the "victim" were *well aware* that the defendant's statements were untrue. But the analogy is *unrealistic* as applied to a *large bank which happens to have the true facts somewhere in its files*. There is no indication that Banco Central's warning was known *to the bank teller* who accepted the check for credit on November 7 or *to Popielski* when she facilitated the deposit and authorized the wire transfer.
>
> It may well be that for other purposes, say, under the Uniform Commercial Code, *notice to the bank* through proper channels is, in some sense and for some purposes, *notice to everyone within the bank*. But Medina did defraud the bank representatives with whom he dealt; and money was credited to his account and transferred out of the bank because of their belief in his statements, and not on some independent basis. *It is hard to imagine any reason of practical policy to accept the unitary-victim argument* that Medina may be urging. *Absent compelling authority*, we reject the argument.
>
> A. 18-19 (emphasis added)

The First Circuit found that money was credited to Medina's account because of his statements to the bank representatives. But the First Circuit also found that it is not enough to show that

Medina obtained money by means of false statements under 18 U.S.C. § 1344(A)(2) because the jury was also charged under the fraud subsection of 18 U.S.C. § 1344.

The First Circuit held that proof of both subsections had to be found to affirm the conviction. The First Circuit opinion failed to explain how Bank of Boston could be defrauded under 18 U.S.C. § 1344(A)(1), if it knew all the true facts misrepresented by Medina.

IV. *Jury Instruction on Bank Fraud and First Circuit Rulings on the Issue of Unanimity.*

Another of the Petitioner's arguments on appeal to the First Circuit, and the issue that forms the basis of the Second Question Presented in this Petition, is that the instructions to the jury impermissibly collapsed the two district bank fraud offenses, § 1344(A)(1) and (A)(2), into one offense and permitted a verdict not based on unanimity.

A. *Jury Instruction on Count One, Bank Fraud.*

Over the Defendant's objection, the jury was instructed:

> In order for the defendant to be found guilty of bank fraud under Count I of the indictment, the government must prove the following things beyond a reasonable doubt: First, that the Defendant executed or attempted to execute a scheme or artifice, one, to defraud a bank; *or* two, to obtain money in the custody or control of a bank by means of false or fraudulent pretenses, representations, or promises.
>
> V, 87 (emphasis added)

B. *First Circuit Rulings on Unanimity.*

For the convenience of the Court, the First Circuit's discussion and rulings on unanimity are here reproduced:

> Finally, Medina makes the interesting argument that the jury might have convicted Medina without true unanimity, some (but not all) jurors believing that he had violated section 1344(A)(1), and others (but not all) believing that he violated section 1344(A)(2). Both the government and Medina agree that the two subsections identify separate crimes. *Accord United States* v. *Bonnett*, 877 F.2d 1450, 1455 (10th Cir. 1989). If so, it follows that Medina could not be convicted of a crime unless the jurors could all agree that at least one of the subsections had been violated. The same problem is sometimes presented where a single crime is defined by several *alternative* acts any one of which suffices for conviction. [footnote omitted].
>
> The government accepts that unanimity was required but cites us to a "general rule" that "when a jury returns a guilty verdict on an indictment charging [in one count] several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *United States* v. *Murray*, 621 F.2d 1163, 1171 n.10 (1st Cir.), *cert. denied*, 449 U.S. 837 (1980). *See also Turner* v. *United States*, 396 U.S. 398, 420 (1970). But it is one thing to say that the *evidence* is sufficient if adequate to establish any one of several acts charged in the alternative; it is quite another to take the general language of *Murray* and *Turner* to foreclose any inquiry into the adequacy of the *instructions*.

Here, the government concedes that two separate crimes were created by the two subsections. Thus, we see no reason why Medina would not have been entitled on request to an instruction that the jury had to agree unanimously that either section (a)(1) *or* subsection (a)(2) was violated (or both). Of course, where two separate crimes are charged but each in a separate count, the problem evaporates because the jury is told that it must be unanimous on each count of conviction. Here, the government charged a violation of *both* subsections in a single count, and Medina, probably not wishing to be charged with three counts rather than two, apparently did not argue that count I was duplicitous. Thus, the risk of jury confusion cannot be answered here by pointing to the normal requirement that the jury be unanimous on any count of conviction.

The government argues that the district court in this case charged the jury that it could find either a scheme to defraud "or" a scheme to obtain monies by means of false representations; that the government had "to prove each part of each offense beyond a reasonable doubt"; and that the jury *verdict* must be unanimous. But these instructions do not clearly tell the jury that it had to be unanimous in finding *within* Count I of the indictment either a scheme to defraud or a scheme based on false representations. That is perhaps what the jury would have understood, but it is not inevitable.

Still, the defense did not ask for any clarification or instruction on this issue, so reversal can be had only for plain error. *E.g.*, *United States* v. *Arias-San-*

tana, 964 F.2d 1262, 1268 (1st Cir. 1992). We see no practical likelihood that the jury could have divided along the lines now suggested by Medina. Although in theory we may be talking about two separate crimes, in this case the evidence offered as to count I made the *same* conduct the basis for both the fraud and misrepresentation branches of count I. Indeed, that is probably why the government charged both subsections in a single count. In all events, on *this* evidence, the jury either had to believe that Medina violated both subsections or neither. There was no realistic possibility of a split verdict of the kind now conjectured by Medina.

If the trial judge had been asked to clarify the point, quite likely he would have told the jury that it had to find unanimously either a scheme to defraud or a scheme based on false representations. Probably he was not asked to do so because no actual threat existed here of a non-unanimous verdict. There was not only no plain error but arguably no error at all. On other facts — for example, where divergent conduct underlay the two branches of subsection (a) or the same conduct could realistically violate one branch but not the other — our view might be quite different.

A. 15-17 (emphasis in original)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO LIMIT THE EXPANSIVE INTERPRETATIONS OF THE BANK FRAUD STATUTE, TO PROVIDE NEEDED GUIDANCE TO THE LOWER COURTS AND THE "COMPELLING AUTHORITY" SOUGHT BY THE FIRST CIRCUIT, TO CLARIFY THE LAW OF PRINCIPAL-AGENT KNOWLEDGE IN FEDERAL CRIMINAL BANK FRAUD CASES, AND BRING THAT LAW INTO THE 1990s.

Bank fraud is perhaps the white-collar crime of the 1990s. The expansive interpretation of the reach of the statute is ever-increasing and far beyond what Congress intended. As the First Circuit Opinion in this case shows, the lower courts are in dire need of guidance and "compelling authority" on the matter of principal-agent knowledge in fraud cases, in order to remove from federal prosecution, or require acquittal in, cases where a bank has clearly not been "defrauded."

In the instant case the Bank of Boston admittedly *had been informed and knew* the true value of the miswritten check *before* it accepted the check for deposit the second time and *well before* it transferred the $350,000 overseas. The First Circuit specifically acknowledged such in its opinion. "Banco Central, after all, had warned Bank of Boston about the mistake before the redeposit." A. 14; "True, the bank could have nullified the deposit before the transfer." A. 18; "Banco Central informed Bank of Boston prior to the second deposit on November 7 that the amount of the check was $365." A. 18.[7]

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[7] In addition to its being explicitly informed of the actual value of the check, by its very possession of the check the Bank of Boston knew the actual value, which was printed on its face in words. It is established banking law that in checks with discrepancies between the words and the figures, the words control. UCC Mass. G.L. c. 106, § 3-118.

The classic case of *Wilson* v. *State*, 85 Miss. 687, 38 So. 46 (1904), is instructive in comparison. In that case, the court found that, where the defendant altered the figures but not the words in a check, conviction for either forgery or attempted

The First Circuit rejected the government's argument that "the crime of bank fraud focuses on [the defendant] and his state of mind, and not on the conduct of the bank" acknowledging, "It might be difficult to defraud an individual, or obtain property by fraud, if the 'victim' were well aware that the defendant's statements were untrue." A. 18.[8] The First Circuit then stated, "But the analogy is *unrealistic* as applied to a *large bank* which *happens* to have the true facts *somewhere* in its files." *Ibid.* (emphasis added).[9] The First Circuit also acknowledged "that for other purposes, say, under the Uniform Commercial Code, notice to the bank through proper channels is, in some sense and for some purposes, notice to everyone within the bank." A. 18-19. Yet that court incongruously concluded, "It is *hard to imagine any reason for practical policy* to accept the unitary-victim argument that Medina may be urging. Absent compelling authority, we reject the argument." A. 19 (emphasis added).

What is "hard to imagine" is the basis for such a conclusion, as reasons of practical policy are chiefly to the contrary. "In the last analysis, it is said that the rule of imputed knowledge is a rule of public policy based upon the necessities of general

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forgery was legally impossible, since the words, not the numbers, determined the value of the check. LaFave and Scott, *Substantive Criminal Law*, Vol. II, p. 44 (1986) write, "Despite all of the disagreement between the commentators on the subject of impossibility, it is uniformly agreed that the result in *Wilson* was correct." (In the instant case, the Petitioner had made no alteration).

[8] In *State* v. *Mullin*, 225 N.W.2d 307, 309 (Iowa 1975), the state argued "that the knowledge of the victim cannot affect the intent of the defendant." The Supreme Court of Iowa reversed a conviction with instructions to dismiss, holding that a defendant cannot be convicted of false drawing or uttering of checks unless he has deceived or defrauded a victim.

Similarly, in *Yeager* v. *State*, 500 So.2d 1260, 1267 (Alabama 1986), the court approved the trial judge's instruction to the jury that if the victim bank "had prior knowledge of the falsity of the representations made by the defendant, if any, they should find the defendant not guilty."

[9] This conclusion is *itself* unrealistic. Judicial notice may be taken that the Bank of Boston, one of the nation's leading banks, is computerized.

commercial relationships. . . ." 3 *Am Jur 2d*, Agency, § 282, p. 788. Certainly "the necessities of commercial relationships" require the imputing of knowledge from principal to agent as well as from agent to principal, and all the more so, not less so, in criminal law.

The fact that a corporation can be sued criminally implies that in criminal actions the knowledge of the agent can be imputed to the principal.

As a matter of practical policy, it seems reasonable that a bank should impute the knowledge of the bank to its employees. Otherwise ordinary acts of ordinary people would easily fall under the reach of the federal bank fraud statute. Any customer whose account is mistakenly overcredited would risk being prosecuted for bank fraud. According to the First Circuit, the fact that such a customer is misinformed by some bank employee about his true balance is no defense, but rather the actual basis of the offense.

There is not much authority on this subject, as could be expected: a defendant should not even be charged with fraud where the bank admittedly has actual knowledge of the true facts, and such cases do not usually reach the trial stage, let alone the appellate level.[10]

In *State* v. *Mullin, supra* at 307-08 (Iowa 1975), the court held that the knowledge of the *agent* was the knowledge of the *bank*:

> The State does not deny the knowledge of Mr. Nicholls, the cashier, is legally imputable to the bank.

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[10] In some instances there may well be *other* charges that could be brought, particularly *state* charges that do not include the defrauding element that is required by the federal statutes under which the Petitioner was indicted. In fact, in the instant case the Petitioner *had* been indicted by the Commonwealth of Massachusetts for larceny over $250 on August 1, 1988. The state Indictment was sealed and never acted upon. After the federal Indictment on September 5, 1991, the state Indictment was dismissed.

> . . . [H]ere the long-accepted rule that the knowledge of an officer is the knowledge of the corporation is applicable [cases cited].
>
> Recourse to that principle in these circumstances leads inexorably to a legal conclusion and not to a fact question for the jury. The bank was not deceived or defrauded.

In *State* v. *Herman*, 162 S.W.2d 873 (Missouri 1942), a conviction for obtaining money under false pretenses was reversed on appeal, the court holding that the knowledge of the *bank* is the knowledge of the *agent*:

> In this case the appellant asked the cashier of the bank what his balance was, and the cashier used the very means at hand to determine that balance; namely, the ledger sheet. He also had at hand at the very time the means [the files of the bank] to have determined that three of the appellant's checks totaling $51 had already been cashed that day. He was not prevented from examining these files by the appellant.
>
> It is true that the appellant told the cashier that he had only drawn three checks totaling $120; yet, he at no time told him what his balance was. In fact, he asked the cashier that question, and, to answer it, the cashier used the bank's records to ascertain the balance, and he was not prevented from using all the records available at hand at the time by any false pretense of the appellant.

There do not appear to be any federal cases on point on this issue, likely for the aforementioned reason that they are not

prosecuted in the first place, or if they are they result in a not-guilty determination.

The well-reasoned case of *United States* v. *Berrigan*, 482 F.2d 171 (3rd Cir. 1973), is reflective of the guidance that this Court should give in the bank fraud area. In *Berrigan*, the court reversed a conviction for smuggling letters out of prison on those counts for which the warden had prior knowledge.[11]

> What the government did not prove — and could not prove because it was a legal impossibility — was the "external, objective situation which the substantive law may require to be present," to wit, absence of knowledge and consent of the warden. Thus, the government failed to prove the "Circumstances or attendant circumstances" vital to the offense. Without such proof, the Consequence or Result did not constitute an offense that violated the federal statute. The warden and the government were aware of the existence of the letters. The courier acted with the consent of the warden.
>
> *Ibid.* at 189

In the instant matter, also, there were "circumstances vital to the offense" which could not be proved — the "defrauding" of the bank — and the actions of the defendant "did not constitute an offense that violated the federal statute." *Ibid.*

State crimes (if there was a crime at all in the instant case) should not be federally prosecuted, and all required elements of a federal statute must be met before a federal conviction may

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[11] This case is also an example of imputed knowledge in criminal prosecutions. It was actually the associate warden who had knowledge but that knowledge was imputed to the warden. *Berrigan, supra* at pp. 184-85, n.17.

result. This Court should grant the Writ and provide the "compelling authority" sought by the First Circuit and the supervisory guidance needed by the federal courts in this area of the law.

II. Certiorari Should Be Granted to Bring the First Circuit in Line With the Other Circuits and Require That a Trial Judge Augment a General Unanimity Instruction When a Defendant Is Charged With Two Crimes in One Count.

The First Circuit declared that "Several of Medina's merits arguments are significant," A. 11, and labeled as an "interesting argument" the argument "that the jury might have convicted Medina without true unanimity, some (but not all) jurors believing that he had violated section 1344(a)(1) [scheme to defraud], and others (but not all) believing that he violated section 1344(a)(2) [false or fraudulent pretenses or representations]." A. 15.

The First Circuit noted that "the government concede[d] that two separate crimes were created by the two subsections," A. 15, and itself specifically conceded that the "instructions do *not* clearly tell the jury that it had to be unanimous in finding within count I of the indictment either a scheme to defraud or a scheme based on false representations. This is *perhaps* what the jury would have understood, but it is *not inevitable*." App. 16 (emphasis added).

Therefore, under the First Circuit's own analysis, the verdict on Count I *may* have been based not on unanimity and should clearly have been reversed.[12] *In re Winship*, 397 U.S. 358 (1970); *United States* v. *Gipson*, 533 F.2d 453 (5th Cir. 1977); *Schad* v. *Arizona*, 111 S.Ct. 2491 (1991).

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[12] Because the jury might have premised its conviction on Count II on an erroneous conviction in Count I, Count II should also have been reversed, for this reason alone, among other reasons.

The First Circuit incorrectly stated that "the defendant did not ask for any instruction on this issue, so reversal can be had only for plain error." A. 16.[13] Even under a plain error analysis, though, the conviction should have been reversed. The requirement of unanimity is a Sixth Amendment constitutional protection. *Patton* v. *United States*, 281 U.S. 276, 288 (1930). "When there is a *reasonable possibility* that a jury has relied on an 'unconstitutional understanding of the law' in reaching a guilty verdict, that verdict must be set aside." *United States* v. *Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988), citing *Francis* v. *Franklin*, 471 U.S. 307, 322 n.8 (1985) (emphasis added).

The Sixth Circuit in *United States* v. *Duncan*, *supra*, quoted the Third Circuit in *United States* v. *Beros*, 833 F.2d 455, 461 (3rd Cir. 1987), quoting the Ninth Circuit *en banc* in *United States* v. *Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983) (*en banc*), stating:

> When it appears . . . that there is a *genuine possibility* of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion in such a case, the trial judge *must* augment the general instruction to *ensure* the jury understands its duty to unanimously agree to a particular set of facts.
>
> (emphasis added)

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[13] The record shows that the Petitioner *did* object to the instruction collapsing the two offenses contained in section 1344, and *did* offer a replacement instruction.

Defendant's counsel, Mr. Wall, objected: "I object, your Honor, to the instructions you gave regarding Count I of the indictment . . . misrepresentation is an element of both parts, both sections. And they really collapse upon each other." Trial Transcript V, day 7, p. 104. Mr. Wall had offered instead a replacement instruction, a Model Instruction by the 9th Circuit.

That language applies here, equally as forcefully, as to particular crimes.[14]

"A finding of harmlessness is warranted only if it appears '*beyond a reasonable doubt* that the [constitutional] error complained of did not contribute to the verdict obtained.' " Justice Blackmun, concurring in *Price* v. *North Carolina*, 114 S.Ct. 2777, 2778 (1994); *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

It is against this background of the law on unanimity — "reasonable possibility," "genuine possibility," and harmlessness "beyond a reasonable doubt" — that the First Circuit concluded, "We see *no practical likelihood* that the jury could have divided along the lines now suggested by Medina . . . [O]n this evidence, the jury either had to believe that Medina violated *both* subsections or neither. There was *no realistic possibility* of a split verdict of the kind now conjectured by Medina." A. 16 (emphasis added)

But these conclusions are far from self-evident and are not necessarily correct, certainly not beyond a reasonable doubt. As argued in the impossibility section, *supra*, there logically and legally could be no "defrauding" of the bank since the bank knew the true facts. Therefore, at least one of the jurors might reasonably have thought that if *any* part of the statute was violated, it was the *second* part. On the other hand, since it was admittedly the teller who made out the second deposit slip and there was no evidence as to who made out the first deposit slip, and since the Spanish Bank, not the Petitioner, made out the check in the first place, at least one of the jurors

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[14] Another unanimity problem appeared in this case. While the First Circuit stated that "two misrepresentations could easily be found," App. 13, the instructions given did not require that all jurors unanimously agree on the falsity of even one statement. "When a statute criminalizes false statements, . . . to convict, the jury must unanimously agree upon which one of those statements the defendant made." *U.S.* v. *North*, 910 F.2d 843, 876 (D.C. Cir. 1990); *U.S.* v. *Holley*, 940 F.2d 916 (5th Cir. 1991); *United States* v. *Duncan*, *supra*.

might reasonably have thought that if *any* part of the statute was violated, it was the *first* part.

Therefore, while all twelve jurors apparently thought bank fraud was committed, there were two *separate* bank fraud crimes charged in Count One, and it cannot be said, beyond a reasonable doubt, that the jury understood that it had to be unanimous as to a particular one, it not having been so instructed. It also cannot be said beyond a reasonable doubt that the jury was unanimous that *both* were committed, since the judge's instructions said "or."

The First Circuit had already found that "these instructions do not clearly tell the jury that it had to be unanimous in finding *within* Count I of the indictment either a scheme to defraud or a scheme based on false representations." A. 16. (emphasis *in original*). Therefore that court seemingly doth protest too much when it gratuitously and inexplicably concluded, "There was not only no plain error but *arguably no error at all*." A. 17. (emphasis added). And with whom was the First Circuit "arguing?" This Court on Petition?

The Petitioner was clearly the victim of a great many, inexcusable bank errors. Even worse, he was then victimized by a sloppy, if not malicious, indictment, and still worse by unconstitutionally deficient judicial instructions. This Court should therefore grant Certiorari, not merely in the interests of justice to reverse an erroneous and unconstitutional conviction, but also in the supervisory interests of the administration of criminal justice: (1) to educate the prosecuting arm of the government as to how indictments, particularly under the internally multiplicitious bank fraud statute, should *not* be brought (two crimes charged in one count); and (2) to supervise and instruct the lower courts, and resolve any conflict therein, as to the constitutional *requirement* that a trial judge *must* augment a general unanimity instruction with a more particular one, where the defendant is charged with two crimes in one count.

Certiorari should be granted to resolve a conflict between the First Circuit's handling of the unanimity issue in these circumstances and its treatment by the other Circuits. *Marks* v. *United States*, 430 U.S. 188, 189 (1977) (certiorari granted to resolve a conflict in the Circuits). The First Circuit should be brought into constitutional line. Certiorari should be granted both because of the central and constitutional importance of the requirement of unanimity in federal criminal trials, and the fact that the resolution of this issue will have wide impact on criminal jury instructions, particularly in the area of bank fraud. *Aldinger* v. *Howard*, 427 U.S. 1, 3 (1976) (certiorari granted "to resolve the conflict on this important question"); *Fuller* v. *Oregon*, 417 U.S. 40, 42 (1974) (certiorari granted "because of the importance of the question presented and the conflict of opinion on the constitutional issue involved").

In *Price* v. *North Carolina*, *supra*, this Court recently granted certiorari and vacated judgment where there was ambiguity on the unanimity of a *sentencing* jury as to mitigating circumstances. *A fortiori*, this Court should grant Certiorari and offer supervisory guidance where there was a reasonable doubt as to jury unanimity in the conviction itself.

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Argued April 6, 1994. Decided October 21, 1994.

UNITED STATES OF AMERICA,
APPELLEE,

v.

ANTONIO MEDINA PUERTA,
DEFENDANT-APPELLANT.

No. 93-2167.

Defendant was convicted of bank fraud, and transportation in foreign commerce of stolen or fradulently obtained funds, in the United States District Court for the District of Massachusetts, Robert E. Keeton, J. Defendant appealed. The Court of Appeals, Boudin, Circuit Judge, held that: (1) vindictive prosecution on part of government had not been shown; (2) bank fraud conviction was valid, even though defendant claimed verdict might not have been unanimous; and (3) evidence supported conviction on both counts.

Affirmed.

1. Criminal Law 1156(1)

When district court refuses to allow new motion to be filed out of time, in criminal case, standard on appeal is abuse of discretion.

2. Criminal Law 36.6

Bank fraud defendant failed to show that government had prosecuted him in violation of promise to refrain in the event that defendant made restitution to victim bank, even though there were indications that defendant had repaid $200,000 out of $350,000 involved; defendant's affidavit had not stated that defendant had ever accepted government's offer or that payments were in compliance with purported agreement.

3. Criminal Law 37.15(2)

Bank fraud defendant did not show that government had indicted him out of vindictiveness, arising from defendant having sued government; defendant's lawsuit against government had been brought after indictment.

4. Banks and Banking 509.10

Government satisfied statutory requirement, for bank fraud conviction, that at least two misrepresentations be alleged, even though indictment alleged attempt to cash single check which showed amount of $365 written out in Spanish and $365,000 in arabic numerals; although only one check was mentioned language of indictment did not preclude government from proving that misrepresentation was made more than once. 18 U.S.C. (1988 Ed.) § 1344(a)(2).

5. Banks and Banking 509.25

Evidence supported conclusion that bank fraud defendant had made the required two misrepresentations to federal bank; surveillance cameras showed defendant twice presenting for deposit check showing $365 in Spanish words, and $365,000 in arabic numerals, with intention to receive credit for $365,000. 18 U.S.C. (1988 Ed.) § 1344(a)(2).

6. Banks and Banking 509.10

Bank fraud defendant could be found to have made misrepresentations to financial institution, in connection with deposit of check amount indicated in Spanish words as $365 and in arabic numerals as $365,000, with intent to receive $365,000 credit, even though defendant claimed that deposit of check was not misrepresentation and check was not factual assertion; misrepresentation was not as to whether there were funds in account to cover check, but that check which stated conflicting amounts was for larger amount. 18 U.S.C. (1988 Ed.) § 1344(a)(2).

7. Banks and Banking 509.10

Defendant who presented check to bank for deposit with amount indicated in Spanish words as $365 and in arabic numerals as $365,000, seeking to be credited with larger sum, had made misrepresentation to a federal depositing bank, even though it was claimed that depositing bank had rights against drawee bank, which was ultimate victim of fraud. 18 U.S.C. (1988 Ed.) § 1344(a)(2).

8. Criminal Law 798(.5)

Defendant could be convicted of bank fraud, even though trial court had not instructed jury that it must find unanimously that defendant had either defrauded bank, or obtained money from bank under false or fraudulent pretenses, representations, or promises, and that in absence of instruction some jurors may have found defendant guilty of fraud and others of misrepresentation; on facts of case defendant's conduct, presenting check which indicated amount of $365 in Spanish words and $365,000 in arabic numerals, for credit of larger sum, supported conviction for either fraud or misrepresentation. 18 U.S.C.A. (1988 Ed.) § 1344(a)(1, 2).

9. Receiving Stolen Goods 1

Defendant had transmitted and transferred in foreign commerce money known to have been stolen, converted or taken by fraud, when he deposited check drawn on Spanish bank showing amount as $365 in Spanish words and $365,000 in arabic numerals, and obtained deposit credit of $365,000, even though he did not withdraw funds and they had arguably not been stolen at time that he requested wire transfer to an account in an English bank; it was sufficient for requirements of statute that money had been available to him after deposit had been made. 18 U.S.C.A. § 2314.

10. Banks and Banking 509.10

Receiving Stolen Goods 1

Defendant could be convicted of bank fraud, and transportation of stolen or fraudulently obtained funds in foreign commerce, in connection with his depositing in American bank of check drawn on Spanish bank indicating amount of $365 in Spanish words and $365,000 in arabic numerals, for which he sought and received deposit credit for larger sum, even though subsequent to deposit and prior to wire transferring of funds, at request of defendant, depositing bank had queried drawee bank about check and had received notice that proper amount was $365; for purposes of criminal statutes notice to bank would not be deemed notice to employees who accepted deposit and authorized wire transfer. 18 U.S.C.A. § 2314; 18 U.S.C. (1988 Ed.) § 1344.

11 Double Jeopardy 135

In determining whether same act or transaction constitutes violation of two distinct statutory provisions, test to be applied to determine whether there are two offenses or only one is whether each provision requires as element proof of fact which other does not.

12. Indictment and Information 129(2)

Defendant could be convicted of bank fraud, and transportation in foreign commerce of stolen or fraudulently obtained funds, without indictment being multiplicitous, even though in both counts there was common element that $365,000 was wired out of defendant's account; fraud count required proof that scheme had been executed against federally insured bank, which transportation count did not, and transportation count required proof of interstate or foreign transportation of stolen property, which fraud count did not. 18 U.S.C.A. § 2314; 18 U.S.C. (1988 Ed.) § 1344.

13. Criminal Law 1139

Denial of motion to direct an acquittal is reviewed de novo.

14. Criminal Law 1156(1)

Trial court's denial of new trial request is reviewed for abuse of discretion.

15. Banks and Banking 509.25
Receiving Stolen Goods 8(3)

Evidence supporting conviction of defendant for committing bank fraud and for transportation in foreign commerce of stolen or fraudulently obtained funds, even though he claimed that he had not noticed, when he presented check for deposit credit of $365,000 as shown in arabic numers on check, that amount was given in Spanish words as $365, and he asserted that he was expecting money in that order of magnitude from a Spanish source; defendant was fluent in Spanish and had shown persistence and haste in getting money deposit into account and then out of country. 18 U.S.C.A. § 2314; 18 U.S.C. (1988 Ed.) § 1344.

Morris M. Goldings with whom Richard S. Jacobs and Mahoney, Hawkes & Goldings, Boston, MA, were on brief, for appellant.

Timothy Q. Feeley, Asst. U.S. Atty., with whom Donald K. Stern, U.S. Atty., Boston, MA, was on brief for, U.S.

Before SELYA, Circuit Judge, BOWNES, Senior Circuit Judge, and BOUDIN, Circuit Judge.

BOUDIN, Circuit Judge.

On September 5, 1991, a grand jury indicted Antonio Medina Puerta, charging him with one count of bank fraud under 18 U.S.C. § 1344 and one count of transportation in foreign commerce of stolen or fraudulently obtained funds under 18 U.S.C. § 2314. The gist of the events described in the indictment was that Medina had deposited a $365 check in his Bank of Boston account, knowingly misrepresented the amount as $365,000, ultimately received a credit of $365,000 to his account, and then transferred $350,000 of these fraudulently obtained funds to his account in an English bank.

At arraignment on October 8, 1991, the magistrate-judge ordered that pre-trial motions by the defense be filed by November 1, 1991. On this deadline, Medina filed a number of motions that were subsequently resolved. Medina's trial date was repeatedly delayed, largely at his own request, until January 4, 1993. In the meantime, on November 24, 1992, following a change of counsel by Medina, his new counsel submitted five additional pre-trial motions, accompanied by a motion seeking leave to file the motions late.

One of these motions — with which this appeal is in part concerned — asked that the case be dismissed on the ground that it was being pursued in breach of a promise by the prosecutor made in 1987 not to prosecute if Medina made restitution

to the bank of $200,000. The government opposed the motion to file out of time. On December 30, 1992, the district court denied the request to file motions out of time (with exceptions not here relevant), ruling that good cause had not been shown for the late filing. The court also said that it had "nevertheless" examined the substantive motions to see whether an exception should be made in the interests of justice; in giving a negative answer, the court found the assertions made in support of the motion to dismiss were insufficient to justify an evidentiary hearing.

Medina was tried in January 1993. The evidence, taken in the light most favorable to the government, *see United States v. Ford*, 22 F.3d 374, 382 (1st Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 257, ___ L.Ed.2d ___, 63 U.S.L.W. 3265 (1994), showed the following. In 1986 Medina was a research associate at a non-profit research organization in Boston then known as the Eye Research Institute. Medina had been born and raised in Spain and was fluent in both English and Spanish. He had Spanish graduate degrees in optics and engineering and a graduate degree in electrical engineering from Massachusetts Institute of Technology.

On November 3, 1986, Medina deposited a check in his account in that branch of the Bank of Boston where he did most of his banking. The check was a bank check prepared by Banco Central of Spain, dated October 30, 1986, at Toledo, Spain, and was made payable to Medina. The written designation of the amount was, in Spanish, "Dolares USA, Trescientos Sesenta Y Cinco," which translates as "three hundred and sixty-five U.S. dollars." There was also an arabic-numeral expression of the amount in a small box on the right-hand side of the check: "USD 365,000." The words "First National Bank of Boston" appear on the check, and both the government and Medina have described it as a check drawn on Banco Central's own checking account at the Bank of Boston.

When Medina deposited the check in his account on November 3, 1986, he listed the amount on the deposit slip as "$365,000." Two days later, on November 5, Medina returned to the branch and requested a customer service representative, Lisa Popielski, to wire $350,000 from Medina's checking account to an account in England. Apart from the November 3 deposit, Medina's balance was about $3,000. Popielski said that she needed to verify that the check had been collected and asked Medina to return the next day. When Medina returned on November 6, Popielski told him that the $365,00 credit had been deleted from his account and the check had been returned to him by mail. She told him to bring the check back to her if he intended to redeposit it.

The following day, November 7, Medina returned with the check and Popielski told Medina that the check had been returned for lack of his endorsement; he then signed the back of the check, Popielski filled out a second deposit slip for him in the amount of $365,000, and Medina redeposited the check into his account. On November 12, Medina returned to the bank and signed a wire transfer order, directing the transfer of $350,000 to an account in his name at Lloyd's Bank in Cambridge, England. Later that morning the funds were wired to England.

When interviewed by the FBI in early December 1986, Medina admitted that he had deposited the check but explained that he thought that the check was funding from a Spanish ministry for a research grant for his work at the Eye Research Institute. He said that he had purchased about $150,000 worth of equipment in Spain where it remained and where some of the research was to be conducted. Medina subsequently gave to the FBI a letter from a Spanish ministry stating that a committee had agreed to propose the funding of a grant.

Medina also submitted to the FBI a summary document prepared within the National Institutes of Health which recom-

mended NIH approval of a research application by Medina with proposed funding of $282,286. There was evidence at trial that this application had never been finally approved and that, if it had been funded, the Eye Research Institute and not Medina would have received the funds. There was also some evidence, apparently disputed, that Medina had in fact purchased $138,755 in specialized equipment in Spain.

At trial it developed that the bank had stumbled repeatedly. The processing section of the bank had queried Banco Central about the check, and on November 6, the day *before* Medina had redeposited the check, Banco Central had wired that the proper amount of the check was $365. When Medina redeposited the check on November 7, only $365 was debited against Banco Central's account, but Medina was credited with a $365,000 deposit. An interoffice adjustment slip was prepared to reduce Medina's deposit by $364,635, but Medina's account records were not corrected until on or about November 25 when most of the money had long since been transferred to England.

Although Medina did not testify, his position at trial was that this was an innocent misunderstanding. Medina did present an expert witness who was familiar with Spain and Spanish accounting who gave testimony on the differences between American and Spanish practices in the writing and punctuation of arabic numbers on large checks. The government's position was that Medina had certainly read the written Spanish words on the check, which indisputedly represented its amount as $365, and had known that he was not entitled to $365,000.

On January 28, 1993, the jury convicted Medina on both counts. Thereafter, Medina filed post-trial motions renewing his request for an evidentiary hearing on the government's supposed breach of a promise not to prosecute. In a supplemental memorandum, Medina said that new evidence showed that the government had a motive to retaliate which explained its

breach of the alleged promise not to prosecute. The court denied the motions, calling the proffer inadequate. On September 30, 1993, the court sentenced Medina to 18 months' imprisonment and required that Medina pay fines or restitution in a total amount of $150,000. The court stayed the sentence pending this appeal.

Medina's initial arguments on appeal related to his pre- and post-trial requests for a hearing on his claim that the government breached its promise not to prosecute if restitution were made. The government says that the original pre-trial motion was submitted late, together with the request for leave to file; leave was not granted because no adequate excuse for the delay was given; and that should be the end of the matter. Medina, scarcely acknowledging the refusal to grant his motion to file late, attacks the district court's ruling that the proffer was insufficient to justify an evidentiary hearing.

[1] We see no reason to choose between the alternative grounds for denial of a hearing — lateness and lack of merit — because each is adequate. The original motion was filed long after the deadline with no explanation other than a change of counsel. Where the district court refuses to allow a new motion to be filed out of time, the standard on appeal is abuse of discretion. *E.g.*, *United States* v. *Roberts*, 978 F.2d 17, 21 n.5 (1st Cir. 1992). If the district judge had rested solely on the lateness of the pre-trial motion and refused to entertain a post-trial replicate of the same motion, there would be no abuse of discretion. Nor would the district court's precautionary comment on the merits in denying leave to file either remove the lateness objection or alter our standard of review.

[2] The result is no different if we do consider the merits. In substance, Medina's proffer asserted that in July 1987 an assistant U.S. attorney advised Medina's then counsel that the government would not prosecute Medina if he would agree to make restitution to the bank in the amount of $200,000. The

proffer then concluded: "By the end of 1988, I [Medina] had paid the Bank of Boston an amount greater than $200,000." Medina's affidavit was also the basis for the post-trial motion making the same request for a hearing on the same ground.

This affidavit does not say that Medina ever formally accepted the government's offer or that his payments to the bank were in compliance with the purported agreement. Our sense that the affidavit is the product of artful dodging is reinforced by indications that the Bank of Boston recovered substantial amounts by attaching Medina's account at another bank. Medina also made no effort, as far as we can ascertain, to remedy the deficiencies in his affidavit after they were first noted by the district court. Evidentiary hearings are not required when there is no likely prospect that they will be fruitful. *United States* v. *McAndrews*, 12 F.3d 273, 280 (1st Cir. 1993).

[3] The supplementary post-trial claim that the prosecution was based on a vindictive motive is scarcely worth comment. Medina's further affidavit on this issue is both sketchy and jumbled, but rests importantly on a lawsuit brought by Medina against the government. The government pointed out in a motion to strike Medina's submission that the lawsuit in question was brought *after* Medina had been indicted. Its untimeliness aside, Medina's new affidavit added little to the prior one and provided no independent basis for an evidentiary hearing.

[4] Several of Medina's merits arguments are significant. We start with those that relate only to bank fraud which was the offense charged in count I of the indictment. As it stood at the time Medina deposited his check (it has since been twice amended), the statute in pertinent part read as follows:

> (a) Whoever knowing executes, or attempts to execute, a scheme or artifice —
>
> (1) to defraud a federally chartered or insured financial institution or

> (2) to obtain any of the monies, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises. . . . [shall be punished as set forth in the statute].

18 U.S.C. § 1344(a).

Count I of the indictment charged that Medina had executed or attempted to execute a scheme both to defraud a federally chartered or insured bank *and* to obtain its property by false or fradulent representations. Consistent with the statutory language, the district judge told the jury that it could convict on count I if it found either a scheme to defraud *or* a scheme to obtain property by means of false or fraudulent representations.

Medina's first objection is that under subsection (a)(2), two or more misrepresentations are required[1] and that here, according to Medina, the government charged only one misrepresentation and proved none at all. The government responds that the evidence was adequate to show a scheme to defraud under subsection (a)(1) so that it does not matter whether misrepresentations need to be multiple or were adequately proved under subsection (a)(2). But here, the false or fraudulent representations charge was also submitted to the jury as an alternative basis for convicting under count I. Thus, at least in theory, a problem might be presented for the government if it had charged only one false representation or failed to prove any.

In fact, we think that the government's indictment alleged multiple representations and the evidence permitted the jury to find at least two. The indictment charged Medina with making false and fraudulent "representaions" [*sic*], and the district court charged the jury that "representations" were re-

[1] This issue was left open in *United States* v. *Lilly*, 983 F.2d 300, 305 n.10 (1st Cir. 1992), and we have no occasion to decide it here.

quired. Although the indictment also said that Medina's conduct involved submitting "a check he represented to be in the amount of $365,000.00, knowing the check to be in the true amount of $365.00," we do not see why this general statement prevented the government from proving that this representation was made more than once.

[5] As for the adequacy of the evidence, two misrepresentations could easily have been found. Medina's first deposit slip said that the check was in the amount of $365,000 when the words on the check said plainly, although in Spanish, that the amount was $365. When the check was redeposited on November 7, Medina again submitted a deposit slip in the larger amount. Medina does not claim that the check was actually for $365,000. Instead he says that Popielski completed the second deposit slip and that there is no evidence to show that he [Medina] filled out the first one.

Ample evidence showed that it was Medina who submitted the check on November 3 with a deposit slip in the amount of $365,000; the evidence included surveillance photographs showing him at the teller's window making a deposit transaction at the time stamped on the back of his deposit slip. As for the redeposit on November 7, again confirmed by surveillance photographs of Medina at the teller's window, it is irrelevant that Popielski wrote the amount on the second deposit slip so long as Medina knowingly presented it. Thus, there was proof of at least two false representations by Medina, one on each presentation of the check.

[6] Medina's second argument on count I is that the district court erred in refusing to instruct the jury that "the deposit of a check alone [is not] a misrepresentation" and that "[a] check is not a factual assertion at all and therefore cannot be characterized as true or false." These requested statements were drawn from *Williams* v. *United States*, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982), where the Court said that a check

was merely an order to pay funds and did not constitute an implied representation that the one who made and deposited it actually had funds in the account on which the check was drawn.[2] The district court refused to charge the jury in this case with the language drawn from *Williams*. We believe that its decision was correct.

The government in our own case was not relying on any implied representation that Medina had funds on deposit sufficient to cover the check. Rather, the government charged that in depositing the check Medina had affirmatively misrepresented — at least through the deposit slips — that the check being deposited was one whose face value was $365,000. We have read both the indictment and the government's closing arguments to the jury, and conclude that there is no chance that the jury misunderstood the government's theory. That theory does not present the implied misrepresentation problem addressed in *Williams*.

[7] Next, in a very brief argument, Medina claims without explanation that "the only possible victim" of any scheme to defraud in the present case would have been Banco Central, admittedly not a federally chartered or insured institution. The evidence showed the Bank of Boston, which is covered by the statute, was induced by Medina's misrepresentations to pay out a large sum to Medina. It is not clear whether Bank of Boston might have had a claim against Banco Central or its account for the latter's mistake in depicting arabic numerals; Banco Central, after all, had warned Bank of Boston about the mistake before the redeposit. But that possibility does not alter the fact that Bank of Boston was the immediate victim of the fraud.

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[2] *Williams* was a prosecution under a false statements statute of a defendant who deposited in his account in one bank a check — not covered by adequate funds — that he drew on his account in a second bank.

[8] Finally, Medina makes the interesting argument that the jury might have convicted Medina without true unanimity, some (but not all) jurors believing that he had violated section 1344(a)(1), and others (but not all) believing that he violated section 1344(a)(2). Both the government and Medina agree that the two subsections identify separate crimes. *Accord United States* v. *Bonnett*, 877 F.2d 1450, 1455 (10th Cir. 1989). If so, it follows that Medina could not be convicted of a crime unless the jurors could all agree that at least one of the subsections had been violated. This same problem is sometimes presented where a single crime is defined by several *alternative* acts any one of which suffices for conviction.[3]

The government accepts that unanimity was required but cites us to a "general rule" that "when a jury returns a guilty verdict on an indictment charging [in one count] several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *United States* v. *Murray*, 621 F.2d 1163, 1171 n.10 (1st Cir.), *cert. denied*, 449 U.S. 837, 101 S.Ct. 112, 66 L.Ed.2d 44 (1980). *See also Turner* v. *United States*, 396 U.S. 398, 420, 90 S.Ct. 642, 654, 24 L.Ed.2d 610 (1970). But it is one thing to say that the *evidence* is sufficient if adequate to establish any one of several acts charged in the alternative; it is quite another to take the general language of *Murray* and *Turner* to foreclose any inquiry into the adequacy of the *instructions*.

Here, the government concedes that two separate crimes were created by the two subsections. Thus, we see no reason why Medina would not have been entitled on request to an instruction that the jury had to agree unanimously that either section (a)(1) *or* subsection (a)(2) was violated (or both). Of

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[3] *Compare United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), involving a statute directed at anyone who "receives, conceals, stores, barters, sells or disposes of" certain stolen property. *See generally* 3 W. LaFave & J. Israel, *Criminal Procedure* § 23.7 (1984).

course, where two separate crimes are charged but each in a separate count, the problem evaporates because the jury is told that it must be unanimous on each count of conviction. Here, the government charged a violation of *both* subsections in a single count, and Medina, probably not wishing to be charged with three counts rather than two, apparently did not argue that count I was duplicitous. Thus, the risk of jury confusion cannot be answered here by pointing to the normal requirement that the jury be unanimous on any count of conviction.

The government argues that the district court in this case charged the jury that it could find either a scheme to defraud "or" a scheme to obtain monies by means of false representations; that the government had "to prove each part of each offense beyond a reasonable doubt"; and that the jury *verdict* must be unanimous. But these instructions do not clearly tell the jury that it had to be unanimous in finding *within* count I of the indictment either a scheme to defraud or a scheme based on false representations. That is perhaps what the jury would have understood, but it is not inevitable.

Still, the defense did not ask for any clarification or instruction on this issue, so reversal can be had only for plain error. *E.g.*, *United States* v. *Arias-Santana*, 964 F.2d 1262, 1268 (1st Cir. 1992). We see no practical likelihood that the jury could have divided along the lines now suggested by Medina. Although in theory we may be talking about two separate crimes, in this case the evidence offered as to count I made the *same* conduct the basis for both the fraud and misrepresentation branches of count I. Indeed, that is probably why the government charged both subsections in a single count. In all events, on *this* evidence, the jury either had to believe that Medina violated both subsections or neither. There was no realistic possibility of a split verdict of the kind now conjectured by Medina.

If the trial judge had been asked to clarify the point, quite likely he would have told the jury that it had to find unanimously

either a scheme to defraud or a scheme based on false representations. Probably he was not asked to do so because no actual threat existed here of a non-unanimous verdict. There was not only no plain error but arguably no error at all. On other facts — for example, where divergent conduct underlay the two branches of subsection (a) or the same conduct could realistically violate one branch but not the other — our view might be quite different.

[9] Medina's next claim of error relates to count II of the indictment in which he was charged with having "transmitted and transferred in foreign commerce money in the amount of $350,000.00, more or less, knowing the same to have been stolen, converted and taken by fraud. . . ." The statute in pertinent part makes it unlawful to "transport in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U.S.C. § 2314.

Medina argues on appeal that under this statute the property must have been stolen "before being transported." *See United States* v. *Tashjian*, 660 F.2d 829, 840 (1st Cir.), *cert. denied*, 454 U.S. 1102, 102 S.Ct. 681, 70 L.Ed.2d 646 (1981). Here, Medina's brief says blandly but without explanation, "no money had been stolen or taken by fraud at the time of the transfer." Possibly what Medina intends to argue is that the bank's money was not stolen, converted or taken by fraud merely on account of the wrongful credit to Medina's account on November 7 because at that time no money had yet been paid out by the bank. Put differently, Medina may be claiming that when transferred the money had not *yet* been stolen.

We see no reason why the fraudulent taking required any more than Medina's deposit of the check in Medina's account, the misrepresentations, the availability of the money to him, and the requisite scienter. Popielski testified that the $365,000

was available to Medina for withdrawl on November 10, at least two days before the wire transfer to England. True, the bank could have nullified the deposit before the transfer, had it been more alert; but from November 10 onward the money was just as much available to Medina as if it were cash stored under his mattress.

[10] Medina's final set of arguments is directed to both of the counts against him. He starts with a straightforward argument that the Bank of Boston could not have been defrauded of its money, nor could the money have been taken by fraud, since Banco Central informed Bank of Boston prior to the second deposit on November 7 that the amount of the check was $365. The government concedes that a defendant, whatever his state of mind, cannot be convicted of possessing drugs or stolen property if the substance is not in fact a controlled substance or the property not stolen. *E.g.*, *United States* v. *Rose*, 590 F.2d 232, 235 (7th Cir. 1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979); *United States* v. *Oviedo*, 525 F.2d 881, 885-86 (5th Cir. 1976). In such cases, of course, a change in the nature of the property can defeat an essential element of the offense.

The government may overstate the matter in arguing that "[i]n contrast the crime of bank fraud focuses on Medina and his state of mind, and not on the conduct of the bank." It might be difficult to defraud an individual, or obtain property by fraud, if the "victim" were well aware that the defendant's statements were untrue. But the analogy is unrealistic as applied to a large bank which happens to have the true facts somewhere in its files. There is no indication that Banco Central's warning was known to the bank teller who accepted the check for credit on November 7 or to Popielski when she facilitated the deposit and authorized the wire transfer.

It may well be that for other purposes, say, under the Uniform Commercial Code, notice to the bank through proper

channels is, in some sense and for some purposes, notice to everyone within the bank. But Medina did defraud the bank representatives with whom he dealt; and money was credited to his account and transferred out of the bank because of their belief in his statements, and not on some independent basis. It is hard to imagine any reason of practical policy to accept the unitary-victim argument that Medina may be urging. Absent compelling authority, we reject the argument.

[11, 12] Medina next says that the same deposit and transfer has been charged as two separate offenses in two counts, making the indictment multiplicitous. This argument rests on the fact that in part of count I the government mentioned the transfer of $350,000 out of Medina's account. The same transfer, including a reference to the original taking by fraud, is the heart of count II of the indictment. Although multiplicity is forbidden by double jeopardy principles, the use of the same evidence or conduct in relation to two different counts does not itself establish multiplicity.

Even "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires [as an element] proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Here, section 1344 required proof that a scheme had been executed against a federally insured bank; section 2314 required proof of interstate or foreign transportation of stolen property. Each provision thus requires proof that the other does not.

[13, 14] Medina's last argument is that the evidence simply did not permit a rational jury to find him guilty on either count and, alternatively, that the district court should at least have ordered a new trial. The denial of a motion to direct an acquittal is reviewed *de novo*, *United States* v. *Gonzalez-Torres*, 980 F.2d 788, 790 (1st Cir. 1992), and the trial court's denial of a

new trial request is reviewed for abuse of discretion. United States v. *Nickens*, 955 F.2d 112, 116 (1st Cir.), *cert. denied*, ___ U.S. ___, 113 S.C.t 108, 121, L.Ed.2d 66 (1992). We need not differentiate sharply, because in this case the jury's verdict was neither irrational nor against the weight of the evidence.

[15] Medina's conduct was largely undisputed, and the critical issues involved his knowledge and state of mind. Absent a confession of guilt, the government's case could not be airtight. Yet there was no proof that Medina had ever applied to a Spanish ministry for a grant of $365,000 or expected such a check from Banco Central. His persistence and haste in getting the money deposited into his account and then out of the country were at least suspicious. The jury must certainly have thought that Medina's story of an innocent mistake was fragmented, improbable in a number of respects, and ultimately — did not hang together.

It is beside the point that the bank's customer service representative misread the check; there is no indication that she could read Spanish, as Medina could. She also had no way of knowing whether Medina might or might not be expecting a check in this amount. Medina's brief states that his own expert witness thought that the value of the check was $365,000. In fact, the expert, whose testimony would not in any event be binding on the jury, testified to the value of the check, "as reflected in that box," *i.e.*, the box that contained the mistaken arabic numerals "$365,000."

Finally, in an attempt to bolster his lack of evidence claim, Medina's brief singles out a variety of comments and arguments made by the prosecutor that Medina says misled the jury. It appears that none of the statements was the subject of objection at trial; while one or two might have been subject to adjustment, none is especially troubling or even remotely close to plain error. The prosecutor's remarks provide no reason to hesitate in our appraisal of the evidence.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2167.

UNITED STATES,
APPELLEE,

v.

ANTONIO MEDINA PUERTA,
DEFENDANT-APPELLEE.

Before

Torruella, Chief Judge, Bownes, Senior Circuit Judge,
Selya, Cyr, Boudin and Stahl, Circuit Judges.

ORDER OF THE COURT
Entered: December 7, 1994

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court:

FRANCIS P. SCIGLIANO
Clerk

APPENDIX.

STATEMENT OF ACKNOWLEDGED AND SIGNIFICANT BANK ERRORS *

1. The Bank made an initial and elementary mistake in accepting the check for deposit without an endorsement. II, 62. It was testified that a teller's *primary* responsibility is making sure that there has been an endorsement. II, 214.

2. During the period and process of returning the check for lack of endorsement, the $365,000 discrepancies between the numbers and words on the check and between the words and the amount deposited were not discovered by the Bank.

3. Medina was told by a bank representative that the check was returned for lack of endorsement, even though the bank stamped the back of the check with a bank guaranteed endorsement. III, 40-41.

4. On re-deposit, on November 7, the bank's *customer service representative* made the critical mistake — a misrepresentation for which the Defendant was charged — filling out the deposit slip on the basis of the numbers rather than the words. II, 94, 97. Prior to this deposit the bank had been notified on November 6 from the issuing bank in Spain that it had mistakenly typed $365,000 rather than $365. III, 30, 31; App. 94(a).

5. The check should not have been accepted for deposit the second time, as it had been stamped, "Unable to pay. Handle on collection basis." II, 172.

6. Once the bank was notified from Spain that the check was prepared in error, an adjustment should have been made to the account, but was not. II, 174-75. Although the adjustment to the defendant's account *should* have been made "as soon as possible," it was not in fact made until *two weeks later*. II, 185-87.

7. The Defendant was not notified of the Bank's discovery of the mistake for *eighteen days*. III, 44, 45.

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* References are to volumes of trial transcript.

8. There were numerous significant mistakes in the Bank's *reports* of this matter. The first report (to the FBI) mistakenly stated that the "numerical amount on the check *was raised* from $365 to $365,000." III, 146 (emphasis added). Such raising as was erroneously reported would obviously have shown criminal intent. However, the amount on the check had not been raised, there was no basis for so stating, and the bank itself later determined that the report was not accurate. III, 146.

9-12. There were further mistakes in the Bank's first report: as to the amount that was wired; the date wired (*not* the day after the deposit); whether a second amount was wired; and whether the check had cleared immediately. III, 146-49.

13-14. In a second report six months later, the amount of money wired was again incorrectly stated, and the second transaction was again incorrectly reported. III, 178-79.

All of the foregoing errors were committed despite the fact that the bank had special internal security for checks more than $2,500. IV, 59. The sheer apparent size of this check should thus have prevented all of the above-listed errors. The foreign aspect of the transaction presented no valid excuse. All branches of the Bank of Boston, a "full service" bank, have "foreign tellers." IV-89. It was acknowledged that many levels and people could and should have correctly handled this check. IV-90.